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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 28 2006

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Marie Johnson

S Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a research associate. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief and resubmits exhibits already part of the record of proceeding. For the reasons discussed below, the petitioner has not overcome the director's bases of denial.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in Physics from the University of Nebraska-Lincoln (UNL). The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary

merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, materials science, and that the proposed benefits of his work, improved understanding of complex polymer systems used in coatings, adhesives and organic electronic devices, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

On page 24 of counsel's appellate brief, counsel concludes that the director's conclusion that the petitioner works in an area of intrinsic merit and that the "work benefit" was national in scope contradicted the director's subsequent conclusion that the national interest would not be adversely affected if an alien employment certification certified by the Department of Labor were required. Counsel thus implies that the third element set forth in *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 215, is automatically met if the first two are met. Such a finding would have the untenable result of rendering the third element meaningless.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. On appeal, counsel asserts that the petitioner's "research has been so widely recognized as outstanding that his work has received ***one patent*** from ***the U.S. Patent and Trademark Office***." (Emphasis in original.) Counsel provides no corroboration for the claim that a U.S. patent is indicative of widespread recognition. Patents are issued to the inventors of original processes or devices that are useful. No evaluation as to the significance of the invention is made. It is a property right, not an honor issued in recognition of outstanding achievement. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

As stated above, the petitioner received his Ph.D. at UNL in 2002. He worked as a research associate at UNL through August 2004, when he accepted a research associate position at the University of Missouri-Columbia (UMC). When he filed the petition in March 2005, he had presented the results of some of his work at UMC but had yet to publish those results. Rather, the petitioner's publications, patent and patent application result from his work at UNL.

The petitioner submitted numerous letters. While not all of the authors have directly collaborated with the petitioner, all but one either attended school with the petitioner or worked at the same institution. The most persuasive independent letters are from those who are outside the petitioner's immediate circle of colleagues, including those colleagues who work in different laboratories at the same institution.

[redacted], an associate professor at UNL, discusses his collaboration with the petitioner. [redacted] states that the petitioner made substantial contributions on every facet, including sample fabrication and characterization, of the invention of a Boron-Carbide based solid-state neutron detector. [redacted] explains that the detector is low-cost, efficient and small, making it an improvement over gas and liquid neutron detectors and "the existing solid-state neutron detectors." As noted by [redacted] the petitioner is a named inventor on the patent for this

detector. An alien, however, cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 221, n. 7. While [redacted] asserts that General Electric, Ordela and Bechtel have all shown interest in the detector, the record lacks any confirmation of this interest from officials of those companies.

The petitioner also studied ferroelectric polymers in projects funded by the National Science Foundation (NSF), the Office of Naval Research (ONR) and the Nebraska Research Initiative (NRI). The petitioner demonstrated the formation of nanomesas from the ferroelectric PVDF/TrFE copolymers. [redacted] characterizes this work as a "breakthrough and important for the development of these highly crystalline nano materials to be used in nanoelectronic devices such as infrared image arrays, ultrasonic detectors, [and] energy transducers." While [redacted] notes that this work was published in a well-respected journal, we will not infer the influence of an article from the journal in which it appeared. Rather, the petitioner must demonstrate the influence of the individual article, such as providing evidence that it was widely and frequently cited. The record lacks evidence that the petitioner's article on nanomesas has been cited at all.

Finally, [redacted] discusses other work by the petitioner without discussing its significance. [redacted] concedes that the petitioner's 2004 work with ferroelectric/ferromagnetic hetero-structured multi layered ultrathin films had yet to be presented or published. We cannot conclude that work that had yet to be disseminated in the field could have proven influential.

[redacted], a senior scientist at J.A. Woollam, Inc., asserts that his company was awarded a contract from the NSF to develop an infrared spectroscopic ellipsometer. The company subcontracted with the petitioner's Ph.D. thesis advisor, [redacted], resulting in a collaboration between [redacted] and the petitioner. [redacted] states that they studied ferroelectric materials that have the potential for use in infrared detectors/sensors with military, industrial and health care implications. The results were published in two articles in the *Journal of Applied Physics*. While [redacted] asserts that he was impressed with the petitioner's dedication and knowledge, he does not explain how the results of their collaboration have influenced the field.

Other references with a connection to the petitioner in Nebraska or China provide similar information, attesting to the originality of the work, the importance of the petitioner's area of research and the potential for practical applications of the petitioner's work. Some references also note that the petitioner has presented his work at various conferences. According to e-mail messages addressed to the petitioner submitted into the record, these conferences accepted either all or the vast majority of abstracts for inclusion and just under half of submitted abstracts for oral presentations. Thus, the petitioner has not established that his conference participation sets him apart from other researches in his field.

[redacted], the petitioner's current supervisor at UMC, asserts that the petitioner is working on a three-year NSF-funded project "to elucidate at the molecular level the growth mode of films of

various flexible0chan molecules absorbed on solid surfaces." The results "can provide a microscopic basis for nano-organic electronic device fabrication, lubrication, and protective coatings." [redacted] asserts that he hired the petitioner based on his knowledge of the physical properties of organic materials and his experimental skills. [redacted] further states that the petitioner "is the lead person conducting experiments utilizing the techniques of x-ray scattering, neutron scattering, atomic force microscopy, electron microscopy and low-energy electron diffraction." In this initial letter, [redacted] does not identify any specific contribution the petitioner had already made to the project.

In a subsequent letter, [redacted] lists several contributions the petitioner has made to his project at UMC and asserts that the petitioner has had the greatest impact of any member of the current group. [redacted] asserts that the petitioner is crucial to the project and would be difficult to replace. Finally, [redacted] asserts that the alien employment certification process would not allow a prospective employer to recognize the petitioner's "past contributions that he has made in the field of organic materials science."

[redacted] does not indicate in his second letter that the petitioner had contributed to his project at UMC as of the date of filing. The petitioner must establish eligibility as of that date. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Moreover, training in advanced technology or unusual knowledge, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. *Id.* at 221.

The sole independent letter is from [redacted] an associate professor at the University of Akron. [redacted] indicates that he met the petitioner at a conference but was aware of the petitioner's work prior to meeting him. [redacted] explains the importance of the petitioner's area of research. Specifically, ferroelectric polymers are "one of the most important and widely used organic materials in military and civil industry." [redacted] characterizes the petitioner's work with nanomesas as important scientifically and practically. As stated above, however, the petitioner's article on this subject has never been cited. [redacted] does not state that he himself is applying this work. Dr. [redacted] reviews other work by the petitioner, including some that had yet to be published, and concludes that the petitioner's contributions "substantially exceed those made by the vast majority of young material scientists." While we do not question [redacted] sincerity, the record is absent corroborating evidence of the petitioner's work being reproduced and applied beyond his colleagues.

In addition to the above letters, the petitioner also submitted evidence of his membership in the UNL chapter of Sigma Xi. Membership in professional associations is in one criterion for aliens of exceptional ability, a classification that normally requires an alien employment certification. We cannot conclude that meeting one criterion, or even the requisite three criteria, warrants a waiver of that requirement. *Matter of New York State Dep't of Transp.,* 22 I&N Dec. at 222. The petitioner has not demonstrated how his nomination and election to membership by the UNL chapter reflects his influence beyond UNL.

The petitioner also submitted evidence that he has reviewed manuscripts for publication in various journals. On appeal, counsel relies on *Buletini v. INS,* 860 F. Supp. 1222 (E.D. Mich. 1994) as evidence of the importance of these review responsibilities. The court in that case held that the regulation at 8 C.F.R. § 204.5(h)(3)(iv), relating to aliens of extraordinary ability pursuant to section 203(b)(1)(A), does not require evidence that participating as a judge was the result of having extraordinary ability. *Id.* at 1231.

First, *Buletini*, 860 F. Supp. at 1231, involved a different classification than the one sought in this matter and, thus, has limited relevance. Moreover, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Regardless, we do not find it violates the reasoning in *Buletini*, 860 F. Supp. at 1231, to examine the evidence submitted as to whether it is indicative of the petitioner's influence in the field. The court in *Buletini* was concerned that an alien would need to first demonstrate "extraordinary ability" in order to meet the judging criterion set forth at 8 C.F.R. § 204.5(h)(3)(iv). We are not following this "circular exercise" that troubled the court. Rather, we are considering what type of review responsibilities are inherent to the field and what review responsibilities might set the petitioner apart from other available U.S. workers with the same minimum qualifications. Ultimately, we cannot ignore that scientific journals are peer reviewed and rely on many scientists to review submitted articles. Thus, peer review is routine in the field; not every peer reviewer has influenced the field.

Finally, the petitioner has submitted evidence of citations of his work. While we withdraw the implication in the director's decision that citations can never serve as valuable evidence, the citation evidence in this matter is not "impressive" as stated by counsel, but minimal. Specifically, as of the date of filing, one of the petitioner's articles had been cited by an independent research team and two teams at UNL, a second article had been cited by one independent research team, his thesis had been cited once by a UNL team and a final article had been cited by a UNL team. Three independent citations as of the date of filing are not significant. Even as of the appeal, no one article authored by the petitioner has been cited by more than two independent research teams. Significantly, [redacted] boasts "hundreds" of citations, suggesting that the petitioner is not in such a narrow field that two citations are notable.

The record shows that the petitioner is respected by his colleagues and has made useful contributions in his field of endeavor. It can be argued, however, that most research, in order to receive funding, must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher working with a government grant inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.